Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LAURA ETTA STANLEY; SUEZETTE A. MINDER; WINTER RANDOLPH JOSEPH HILL, individually and as personal representative of the Estate of Winter Charles Joseph Hill, Deceased,

Petitioners

v.

TOWNSHIP OF CLAY; KENNETH L. CANODE; HERMAN MONTVILLE, JR.; GRAHAM RUMMEL; DENNIS SCHAIBLE; PHILLIP LEE WITHERSPOON, SR.; MARK WESTON; JAMES HAGGERTY; STEVE NOWICKI; MICHAEL WAITE,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Robert J. Lord
Counsel of Record for Petitioners
8388 Dixie Highway
Fair Haven, MI 48023
(810) 725-4231

FILED

Introductory Statement

It is a material matter of record in the case below that on 9/28/98 the district court confrontationally, disparagingly, and without concern for impartiality, bench-ordered the petitioners' attorney to make a 30-day filing of a bench-dominated "consolidated amended complaint" — as shown in a transcript of a certain 9/28/98 "Motion To Dismiss" hearing (Appendix E, 45a-56a); and it is a material matter of record that the district court did not render, impartially or otherwise, any "opinion" as attributed to the district court in the 5/4/00 ORDER of the Court of Appeals (Appendix A, 1a).

Questions Presented For Review

1. Did the Court of Appeals err seriously in entering its 5/4/00 ORDER (Appendix A, 1a) in such a 23-word manner and form ["It is ORDERED that the judgment of the district court be, and it hereby is, affirmed upon the opinion of the district court."] so as not only to constitute a departure seriously far from the accepted and usual course of appellate proceedings, but so as, also, to constitute an afirmative appellate sanction of the district court's departure seriously far from the accepted, usual, and mandated, course of district court "dismissal" and "summary judgment" and 28 U.S.C. § 455(a) "recusal"proceedings — so as, altogether, to call seriously for the exercise of this Court's supervisory power?

2. Did District Judge Avern Cohn err seriously in entering his 4/16/99 MEMORANDUM AND ORDER (Appendix D, 33a-44a) containing his 3-page quarrelsome and self-exculpatory "Recusal" rejection (Appendix D, 34a-36a) of the petitioners' repeated requests for his self-executing observance of his 28 U.S.C. § 455(a) recusal as mandated in Roberts v Bailar, 625 F2d 125, 128-129 (CA 6,1980)?

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Parties

The names of the parties to the proceedings in the district court whose JUDGMENT (Appendix B, 2a) is sought to be reviewed are contained in the caption of the case.

Citations

The only official reports of orders in the case are: (1) the 5/4/00 ORDER of the Court of Appeals (Appendix A, 1a); (2) the district court's 4/16/99 JUDGMENT (Appendix B, 2a); and (3) the district court's 4/16/99 MEMORANDUM AND ORDER (Appendix D, 33a-44a).

Concise Statement Of The Basis For Jurisdiction In This Court

The ORDER of the Court of Appeals (Appendix A, 1a) was entered on May 4, 2000.

Constitutional Provisions And Statutes Involved In The Case

U.S. Const, Am IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Due Process Clause of U.S. Const, Am XIV, concerning the "shocks the conscience" - substantive due process right concerning homicidal deadly force action and conduct which "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses" as guaranteed by the Due Process Clause of the Fourteenth Amendment, and

as authoritatively described in Wilson v Beebe, 772 F2d 578, 581-586 (CA , 1985), citing Tennessee v Garner, 471 US 1, (1985).

42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ..."

28 U.S.C. § 1331: "The district courts shall have original jurisdiction of all civil action arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 455 (a): "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Michigan Compiled Laws 600.2922. **Wrongful death** Sec. 2922: **"Liability of tort-feasors; exclusiveness of remedy.** Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances that constitute a felony."

Michigan Compiled Laws 600.2922.(6): "(6) **Damages; distribution**. In every action under this section the court or jury may award damages as the court or jury shall consider fair and equitaqble, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable, reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows: ..."

Concise Statement Of The Case Setting Out The Facts Material To Consideration Of The Questions Presented

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Laura Etta Stanley's COUNT ONE 42 USC § 1983/Restatement, Second, Torts § 46(1) Consolidated Amended Complaint (Appendix C, 5a-18a).

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Suezette A. Minder's COUNT TWO Restatement, Second, Torts § 46(1)/ 28 USC 1331 Consolidated Amended Complaint (Appendix C, 18a-22a).

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Winter Randolph Joseph Hill's COUNT THREE Individual Restatement, Second, Torts § 46(1) 28 USC § 1331 Consolidated Amended Complaint (Appendix C, 22a-25a).

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Winter Randolph Joseph Hill's COUNT FOUR Plaintiff Personal Representative's 42 USC § 1983 Consolidated Amended Complaint (Appendix C, 26a-28a).

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Winter Randolph Joseph Hill's COUNT FIVE Plaintiff Personal Representative's MCL 600.2922(6) Intentional-Bad Faith-Wrongful Act-Gross Negligence Complaint For Winter Charles Joseph Hill's Pain and Suffering While Conscious Between The Time Of Injury And Death (Appendix C, 29a-30a).

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Winter Randolph Joseph Hill's COUNT SIX Plaintiff Personal Representative's MCL 600.2922(6) Intentional-Bad Faith-Wrongful Act-Gross Negligence Complaint For His Father's Loss of The Society and Companionship Of Winter Charles Joseph Hill , Deceased (Appendix C, 30a-31a).

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Winter Randolph Joseph Hill's COUNT SEVEN Plaintiff Personal Representative's MCL 600.2922(6) Intentional-Bad Faith-Wrongful Act-Gross Negligence Complaint For Suezette A. Minder's Loss Of The Society And Companionship Of Her Half Blood Brother (Appendix C 31a-32a).

Appendix F, 57a-63a, is a transcript of a certain 4/1/98 "Defendant's Partial Motion To Dismiss" district court proceeding showing the facts and circumstances of the district court's (District Judge Avern Cohn's) 25-year old adversarial and 4/1/98 confrontational courthouse encounters with the petitioners' attorney.

Reasons For Granting The Petition

Rule 1, in material and mandatory part, provides: "These rules govern the procedure in the United States district courts in all suits of civil nature . . . They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."; and Rule 8(f) is entirely mandatory: "All pleadings shall be so construed as to do substantial justice."

Conley v Gibson, 355 U.S. 41 (1957) at 45-46: ". . . In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. ..."

Jenkins v McKeithen, 395 U.S. 411 (1969), at 421: "For purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. ...And, the complaint is to be liberally construed in favor of the plaintiff. See, Fed. Rule Civ. Proc. 8(f); . . ."

Scheuer v Rhodes, 416 U.S. 232 (1974), at 236: "When a federal court reviews the sufficiency of a complaint, before reception of any evidence ... its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, ... the allegations of the complaint should be construed favorably to the pleader."

Gomez v. Toledo, 446 U.S. 635 (1980), at 638-641: "Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." 42 USC § 1983 [42 USCS § 1983]. This statute, enacted to aid in "the preservation of human liberty and human rights." Owen v. City of Independence, 455 US 622, 636, 63 L Ed 2d 637, 100 S Ct 1398 (1980), quoting Cong Globe, 42d Cong. 1st Sess, App 68 (1871) (Rep. Shellabarger), reflects a congressional judgment that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees," 445 US, at 651, 63 L Ed 2d 673, 100 S Ct 1398. As remedial legislation, § 1983 is to be construed generously to further its primary purpose. ... Nothing in the language or legislative history of § 1983, however, suggests that in an action brought against a public official whose position might entitle him to immunity if he acted in good faith, a plaintiff must allege bad faith in order to state a claim for relief. By the plain terms of § 1983, two - and only two - allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See Monroe v. Pape, 365 US 167, 171, 5 L Ed 2d 492, 81 S Ct 473 (1961). ...Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question. ... Since qualified immunity is a defense, the burden of pleading it rests with the defendant. ..."

As manifestly shown on the face of the petitioners' seven-count Consolidated Amended Complaint (Appendix C, 3a-32a):

(1) COUNT ONE petitioner Laura Etta Stanley states a claim upon which relief can be granted (Appendix C, 3a-18a); and

(2) COUNT TWO petitioner Suezette A. Minder states a claim upon which relief can be granted (Appendix C, 18a-22a); and

(3) COUNT THREE petitioner Winter Randolph Joseph Hill states a claim upon which relief can be granted (Appendix C, 22a-25a); and

(4) COUNT FOUR petitioner Winter Randolph Joseph Hill's Personal Representative 42 USC § 1983 Consolidated Amended Complaint states a claim upon which relief can be granted (Appendix C, 26a-28a); and

(5) COUNT FIVE petitioner Winter Randolph Joseph Hill's Personal Representative's MCL 600.2922(6) Intentional-Bad Faith-Wrongful Act-Gross Negligence Complaint For Winter Charles Joseph Hill's Pain And Suffering While Conscious Between The Time Of Injury And The Time Of Death states a claim upon which relief can be granted (Appendix C, 29a-30a): and

(6) COUNT SIX petitioner Winter Randolph Joseph Hill's Personal Representative's MCL 600.2922(6) Intentional -Bad Faith-Wrongful Act-Gross Negligence Complaint For His Father's Loss Of The Society And Companionship Of Winter Charles Joseph Hill, Deceased, states a claim upon which relief can be granted (Appendix C, 30a-31a); and

(7) COUNT SEVEN petitioner Winter Randolph Joseph Hill's, Personal Representative's MCL 600.2922(6) Intentional-Bad Faith-Wrongful Act-Gross Negligence Complaint For Suezette A. Minder's Loss Of The Society And Companionship Of Her Half Blood Brother states a claim upon which relief can be granted (Appendix C, 31a-32a).

A summary judgment is properly granted only where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use. Brunswick Corporation v Vineberg, 370 F2d 605, 608, 612 (CA 5, 1959).

Gregg v. Allen-Bradley Co., 801 F2d 859 (CA 6, 1986), at 861: "Summary judgment is an appropriate means of disposing of a case where there is no genuine issue as to material fact. Fed. R. Civ. P. 56 (c). The burden is on the moving party to show conclusively that no genuine issue of material fact exists. Smith v. Hudson, 600 F. 2d 60, 63 (6th Cir.), cert. denied, 444 U.S. 986, 100 S.Ct. 495, 62 L. Ed. 2d 415 (1979). The district court must view the evidence with all inferences drawn therefrom read in the light most favorable to the party opposing the motion. Id."

Employers Insurance of Wassau v Petroleum Specialties, Inc., 69 F3d 98 (CA 6, 1995), at 101: "This court reviews de novo the district court's grant of Appellees' motion for summary judgment. Boggs v Eagle-Picher Indus, Inc., 957 F2d 268, 271 (6th Cir.), cert. denied, ___ U.S. ___ , 113 S. Ct, 466, 121 L.Ed. 2d 374 (1992). This court must affirm the district court only if it determines that the pleadings, affidavits, and other admissions show 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Fed. R. Civ. P. 56(c). ..."

Routman v Automatic Data Processing, Inc., 873 F2d 970 (CA 6, 1989), at 971: "A district court may properly enter summary judgment sua sponte where the record discloses the absence of an issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 92 L.Ed. 2d 202 (1986). However, before summary judgment may be granted against a party, Fed.R.Civ.P. 56(c) mandates that the party opposing summary judgment be afforded notice and a reasonable opportunity to respond to all issues to be considered by the court. Portland Retail Druggist Ass'n v. Kaiser Foundation Health Plan, 662 F.2d at 645. Rule 56(c) requires at a minimum that an adverse party be extended at least ten days notice before summary judgment may be entered. Rule 56(c); Beck v. Borden, Inc., 724 F.2d 44 (6th Cir. 1984); Kistner v. Califano, 579 F.2d 1004, 1005 (6th Cir.1978) (per curiam).

"Noncompliance with the time provision of the rule deprives the court of authority to grant summary judgment, ... unless the opposing party has waived this requirement, ... or there has been no prejudice to the opposing party by the Court's failure to comply with this provision of the rule." Kistner, 579 F. 2d at 1005 (citations omitted). See also Winbourne v. Eastern Air Lines, Inc., 632 F. 2d 219 (2d Cir. 1980); Management Investors v. United Mine Workers of America, 610 F. 2d 384 (6th Cir. 1979); Adams v. Campbell County School Dist., 483 F. 2d 1351, 1363 (10th Cir. 1973); Winfrey v. Brewer, 570 F. 2d 761, 764 (8th Cir. 1987) ("[T]he procedural requirements of Rule 56 are to be strictly adhered to.").

It is a material matter of record that neither the municipal respondent Township of Clay, nor any one of the six individual municipal respondent police officers (Canode, Montville, Rummel, Schaible, Witherspoon, and Weston), nor any one of

the three individual respondent state police officers (Haggerty, Nowicki, Waite), either answered, or denied, or otherwise defended, all, or any part of the petitioners' seven-count Consolidated Amended Complaint claims and causes of action (Appendix C, 3a-32a); and the district court erred seriously in entering his unauthorized and improper sua sponte 4/16/99 JUDGMENT IN A CIVIL CASE (Appendix B, 2a) in such a 19-word manner and form ["IT IS ORDERED AND ADJUDGED that defendants' motion for summary judgment is GRANTED and the above case is DISMISSED."] so as, altogether, to constitute a departure seriously far from the accepted, and usual, and mandated, course of district court "dismissal" and "summary judgment" and 28 U.S.C. § 455(a) "recusal" proceedings - so as, altogether, to call for the exercise of this Court's supervisory power.

28 U.S.C. § 455(a) provides that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. The language of 28 U.S.C. § 455(a) sets up an objective standard, rather than the subjective standard set forth in the prior statute. According to the report of the House Judiciary Committee, the general standard of section 455(a) was designed to promote the public's confidence in the impartiality and integrity of the judicial process by saying, in effect, that if any reasonable factual basis for doubting the judge's impartiality exists, the judge shall disqualify himself. Because § 455(a) focuses on the appearance of impartiality, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word might in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality. Potashnick v. Port City Construction Co., 609 F. 2d 1101, 1110-

1111 (CA 5, 1980).

Roberts v. Bailar, 625 F. 2d 126 (CA 6 1980), at 128-129: "... Section 455(a) is a self-executing provision for the disqualification of federal judges. There is no particular procedure that a party must follow to obtain judicial disqualification under § 455(a). Instead the section sets forth a mandatory guideline that federal judges must observe sua sponte. ... To promote confidence in the impartiality of the federal judicial system, the Congress in 1974 shifted the focus of § 455(a). "Any ... judge," § 455(a) now provides, "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." No longer is a judge's introspective estimate of his ability to hear a case the determinate of disqualification under § 455. The standard now is objective. It asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge. "[I]f there is a reasonable factual basis for doubting the judge's impartiality," the Congressional Committee reports on the 1974 amendment to § 455 explain, the judge "should disqualify himself and let another judge preside over the case." Even where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial."

SCA Services, Inc. v. Morgan, 557 F. 2d 110 (CA7, 1977), at 113: "In 1972, the House of Delegates of the American Bar Association adopted a new Code of Judicial Conduct which advocated the "appearance of justice" standard for disqualification. One year later the Judicial Conference applied this new code to all federal judges. ... Finally, in 1974, Congress enacted a new section 455 which was designed to reconcile the 1972 Code of Judicial Conduct with the federal statutes. Its purpose was to eliminate "dual standards, statutory and ethical, couched in uncertain language [that] had the effect of forc-

ing a judge to decide either the legal or ethical issue at his peril." Congress also intervened to overrule the concept that close cases involving disqualification should be resolved on the ground that a judge had a "duty to sit." ... The new statute contains the general, all-inclusive objective standard of the 1972 Judicial Code: a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a)."

Fredonia Broadcasting Corp. Inc. v. RCA Corporation, 569 F2d 251 (CA 5, 1978), at 256: "...[W]e are concerned with the purity of the judicial process and its institutions." Kinnear-Weed Corp. v. Humble Oil & Refining Co., 403 F. 2d 439-40 (5th Cir. 1968), ... The Supreme Court has repeatedly stated that "justice must satisfy the appearance of justice." Offut v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11 (1954); accord, In re Murchison, ... 99 L. Ed. 942 (1955); ... The Code of Judicial Conduct for United States Judges ... expresses concern that the judicial system be protected from the appearance of impropriety in the eyes of both the parties and the general public."; and at 257: "Section 455(a) is a general safeguard of the appearance of impartiality ..."

District Judge Avern Cohn erred seriously in making and entering his 4/16/99 MEMORANDUM AND ORDER (Appendix D, 33a-44a) containing , as it does, his 3-page quarrelsome and self-exculpatory rejection (Appendix D, 37a-41a) of the petitioners' four repeated requests for his self-executing observance of his 28 U.S.C. § 455(a) recusal as mandated in: (1) SCA Services, Inc. v. Morgan, supra, (2) Potashnick v. Port City Construction Corp. Inc., supra and (3) Roberts v. Bailar, supra,— because if an "average person on the street," or if a reasonable person, were to know all the facts and circumstances

of the confrontational origin (Appendix E, 45a-56a), and the unauthorized and improper sua sponte "summary dismissal" (Appendix B, 2a), of the petitioners' seven-count Consolidated Amended Complaint calims and causes of action (Appendix C, 3a-32a), that "average person on the street," and that reasonable person, not only might, but would, harbor doubts and questions about District Judge Avern Cohn's impartiality; and, further, if an "average person on the street," and if a reasonable person, were to know the facts and circumstances of then attorney Avern Cohn's 25-year-old adversarial, and his (District Judge Avern Cohn's) 4/1/99 confrontational, encounters with the petitioners' attorney (Appendix F, 57a-63a) that "average person on the street," and that reasonable person, not only might, but would, harbor further doubts and further questions about the district court's impartiality.

Kinnear-Weed Corporation v. Humble Oil & Refining Company, supra, at 439: "... [A]s we several times make clear, this is a matter which transcends the interests of the parties. The purity of the judicial process and its institutions is the thing at stake. ..."

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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Counsel of Record for Petitioners
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(810) 725-4231

Date: July 31, 2000

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APPENDIX A
Case No: 99-1556
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

LAURA ETTA STANLEY; SUZETTE A. MINDER; WINTER RANDOLPH JOSEPH HILL, individually and as personal representative of the Estate of Winter Charles Joseph Hill, Deceased

Plaintiffs - Appellants

V.

TOWNSHIP OF CLAY; KENNETH L. CANODE; HERMAN MONTVILLE,JR., GRAHAM RUMMEL; DENNIS SCHAIBLE; PHILLIP LEE WITHERSPOON, SR.; MARK WESTON; JAMES HAGGERTY; STEVE NOWICKI; MICHAEL WAITE

Defendants - Appellees

BEFORE: MERRITT, JONES, and CLAY, Circuit Judges

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is **ORDERED** that the judgment of the district court be, and it hereby is, affirmed upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT
(s) Leonard Green, Clerk

FILED
MAY 4, 2000
LEONARD GREEN, Clerk

APPENDIX B
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 97-76159

LAURA ETTA STANLEY, et al, *Plaintiffs,*
V.
TOWNSHIP OF CLAY, et al, *Defendants.*

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion for summary judgment is GRANTED and the above case is DISMISSED.

April 16, 1999

John P. Mayer
Clerk

(s) Judy Cassady
(By) Deputy Clerk

APPENDIX C
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Case No. 97-76159 Hon. Avern Cohn
CONSOLIDATED AMENDED COMPLAINT

LAURA ETTA STANLEY, SUEZETTE A. MINDER, WINTER RANDOLPH JOSEPH HILL, individually and as Personal Representative of Estate of Winter Charles Joseph Hill, Deceased, *Plaintiffs*

V

TOWNSHIP OF CLAY, KENNETH L. CANODE, HERMAN E. MONTVILLE, JR., GRAHAM RUMMEL, DENNIS SCHAIBLE, PHILLIP L. WITHERSPOON, SR., MARK WESTON, JAMES HAGGERTY, STEVE NOWICKI and MICHAEL WAITE, *Defendants*

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Appendix C

PROOFS OF SERVICE

The undersigned attorney certifies that a copy of the within document together with the Memorandum of Law in Support of Plaintiffs' Consolidated Amended Complaint was served upon the township defendants in this cause by service of copies of the same upon their attorneys at their business address on the 26th day of October, 1998, by U.S. Mail.

(s) Robert J. Lord (P16797

Appendix C

Plaintiffs Laura Etta Stanley, Suezette A. Minder and Winter Randolph Joseph Hill, individually and as Personal Representative of the Estate of Winter Charles Joseph Hill, deceased, by their undersigned attorney and pursuant to the authority, instruction and directive therefor as stated by Honorable Avern Cohn at the September 28, 1998, Case No. 97-76159 consolidated amended complaint proceeding (copy attached), state their consolidated amended seven-count complaint as follows:

COUNT ONE

Plaintiff Laura Etta Stanley's 42 USC § 1983/Restatement, Second, Torts § 46(1) Consolidated Amended Complaint

1. Plaintiff Laura Etta Stanley is the "CONTACT LAURA FORRESTER: LAURA ETTA FORRESTER" and the "LAURA" referred to at page 3 of defendant James Haggerty's so-called: "BURGLARY FORCED ENTRY" Michigan Department of State Police ORIGINAL INCIDENT REPORT (Exhibit 1); and she is the "LAURA" referred to at pages 4 and 5 of Exhibit 1.

2. Defendant Township of Clay is an organized township and body corporate as therefor provided in Const. 1963, art VII, § 17; and the defendant township, over a period of years and pursuant to the authority and provision therefor in PA 1945, No. 246, § 1(1), adopted various ordinances regulating the health, safety and general welfare of persons and property, including but not limited to fire protection, the licensing of business establishments [such as the "AT OR NEAR: DECKERS LANDING RESTAURANT/BAR/MARINA" referred to at page 1 of Exhibit 1], and the licensing and regulating of public amusements, and provide penalties for the violations of the ordinances; and, over the years, the defendant township enforced its ordinances and, in July of 1995, established and employed its so-called "Clay Police Department," as so twice referred to at page 1 of a certain Canode Exhibit No.1 (Exhibit 2), with full power to enforce its ordinances.

3. Defendant Kenneth L. Canode is the "KEN CANODE CHIEF OF POLICE CLAY POLICE DEPARTMENT" referred to at the first page of Exhibit 2; and he is the "Chief Canode, the highest executive

official in Clay Township's police department" referred to at page 9 of Honorable Avern Cohn's April 3, 1998 MEMORANDUM AND ORDER (Exhibit 3) in Case No. 97-76159; and the defendant Kenneth L. Canode is

(1) the "COMPLAINANT CHIEF KEN CANODE" and the "Clay Township Police Chief CANODE" referred to at page 1 of Exhibit 1; and he is

(2) the "Police Chief KEN CANODE" referred to at page 1 of Exhibit 1; and he is

(3) the "CONTACT CHIEF CANODE:" and the "Chief CANODE" and "the Chief" referred to at page 2 of Exhibit 1; and he is

(4) the "Chief CANODE" referred to at page 3 of Exhibit 1; and he is

(5) the "Chief Ken Canode" and the "Chief Canode" referred to in the TIMES HERALD newspaper publication (Exhibit 4); and he is

(6) the "Police Chief Kenneth Canode" referred to in the TIMES HERALD newspaper publication (Exhibit 5); and he is

(7) the "Chief Canode" and the "Township Police Chief Kenneth Canode" referred to in the TIMES HERALD newspaper publication (Exhibit 6); and he is

(8) the "Clay Police Chief Ken Canode" and the "Canode" referred to in the newspaper publication (Exhibit 7); and he is

(9) the "Clay Township Police Chief Ken Canode" and the "Chief Canode" referred to in the THE VOICE newspaper publication (Exhibit 8); and he is

(10) the "Clay Township Police Chief Ken Canode" and the "Chief Canode" referred to in the TIMES HERALD newspaper publication (Exhibit 9); and he is

(11) the "Clay Township Police Chief Kenneth Canode" and the "Chief Canode" referred to in the TIMES HERALD newspaper publication (Exhibit 10); and he is

(12) the "Chief Canode, Clay Twp. P.D." referred to at the fifth page of Prosecuting Attorney Elwood L. Brown's July

8, 1997 5-page so-called "Review of Police Officer Involved Shooting Deceased: Winter Charles Hill" (Exhibit 11); and he is

(13) the "CHIEF CANODE" referred to at page 2 of the defendant Mark Weston's 2-page "3:50 AM COMPLAINANT CTPD" - "INCIDENT NO. 1526-97" ALGONAC POLICE DEPARTMENT ORIGINAL INCIDENT REPORT (Exhibit 12); and he is

(14) the "CHIEF CANODE" referred to at page 2 of defendant Phillip L. Witherspoon, Sr.'s 2-page "3:50 AM" - "INCIDENT NO 1526-97" ALGONAC POLICE DEPARTMENT ORIGINAL INCIDENT REPORT (Exhibit 13).

4. Defendants Herman E. Montville, Jr., Graham Rummel and Dennis Schaible, on Sunday, June 22, 1997, and for several years theretofore, were three of the defendant township's several employed police officers; and on said day, and for several years theretofore, it was the intentional, reckless and maliciously extreme, in degree, and outrageous, in character, policy and practice and custom of the defendant township's contractually employed policymaker - "Chief Canode" - "the highest official in Clay Township's police department" defendant Kenneth L. Canode neither:

(1) to train, instruct, educate, or even so much as to familiarize at all, defendants Montville, Jr., or Rummel, or Schaible, or any other of the defendant township's several other employed police officers, concerning the constitutional matters of US Const, Am IV; nor

(2) to provide defendant Montville, Jr., or any of the defendant township's several other employed police officers, any facility, aid, or even so much as any guidance at all, to obtain "Warrants" as therefor provided by US Const, Am IV; nor

(3) to train, supervise, instruct, educate, or even so much as to familiarize at all, defendants Montville, Jr., or Rummel,

or Schaible, or any of the defendant township's several other employed police officers, concerning the "shocks the conscience" - substantive due process right, a substantive due process right concerning homicidal deadly force action and conduct which offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous crimes," as guaranteed by the Due Process Clause of US Const, Am XIV, and as authoritatively described in Wilson v Beebe, 770 F2d 578, 581-586 (CA 6, 1985), citing Tennessee v Garner, 471 US 1 (1985); nor

(4) to train, supervise, instruct, educate, or even so much as to familiarize at all, defendants Montville, Jr., or Rummel, or Schaible, or any of the defendant township's several other employed police officers, concerning either the prohibited use, or the prohibited utilization, of deadly force weapons, such as the Sig-Sauer 9mm (model P226) weapons issued by defendant township, altogether, in accordance with the prohibited use and prohibited utilization of US Cons,, AM IV, standards authoritatively described in the Tennessee v Garner, 471 US 1 (1985) Opinion [by White, J., joined by Brennan, Marshall, Blackmun, Powell, and Stevens, JJ.] that

(a) the Fourth Amendment prohibits the use of deadly force to prevent the escape of a suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer or others; and that

(b) a police officer may not seize an unarmed, nondangerous suspect by shooting him dead; and that

(c) the apprehension of a person by the use of deadly force is a seizure subject to the reasonable requirement of the Fourth Amendment; and that

(d) the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitu-

tionally unreasonable.

5. Defendant James Haggerty is the "Det. James Haggerty" referred to in the TIMES HERALD newspaper publication (Exhibit 14); and defendants James Haggerty, Michael Waite and Steve Nowicki, on Sunday, June 22, 1997, and for years theretofore, were trained, instructed and educated, not only to: "(S)hoot until the subject is down," as asserted by "Det. James Haggerty" in Exhibit 14, but they were also trained, instructed, and educated in the "shoot to kill" use and the "shoot to kill" utilization of Sig-Sauer 9mm (model P226) deadly force weapons issued to the Michigan State Police Officers, altogether notwithstanding the constitutionally prohibited deadly force use and prohibited deadly force utilization standards as described in the Tennessee v Garner, supra, 1985 Opinion.

6. On Sunday, June 22, 1997, at about 10 minutes or so following the "3:32 a.m." time referred to at page 2 of Exhibit 1, and while Winter Charles Joseph Hill was seated "on a bar stool," as so referred to at page 1 of defendant Haggerty's 3-page "Sun, Jun 22, 1997" - "Wed, June 25, 1997 fabricated so-called "BURGLARY FORCED ENTRY" - "suspect(s)" - "suspect" Michigan Department of State Police SUPPLEMENTAL INCIDENT REPORT (Exhibit 15), defendant Montville, Jr. entered DECKERS LANDING BAR RESTAURANT in an unreasonable search of a "suspect A" or "suspects"; and, then and there, and as a proximate cause of the intentional, reckless and maliciously extreme, in degree, and outrageous, in character, policy and practice and custom of defendant township's contractually employed policymaker - "Clay Township Police chief KEN CANODE," defendant Montville, Jr., walked some "30'8" into DECKERS LANDING BAR RESTAURANT onto a certain ceramic flooring area to within a few feet from two metal swinging kitchen doors; and, then and there, defendant Montville, Jr., under color of state law, unreasonably, intentionally, recklessly and maliciously, and in a manner of police of-

ficer conduct extreme, in degree, and outrageous, in character, shot Winter Charles Joseph Hill with his (defendant Montville, Jr.'s) Sig-Sauer 9mm (model P226) deadly force weapon thereby not only inflicting Winter Charles Joseph Hill's homicidal "Gunshot Wound of Abdomen" injury, as indicated in Certificate of Death 1324492 (Exhibit 16), but also unreasonably seizing Winter Charles Joseph Hill in malicious violation of US Const, Am IV, and the Due Process Clause of US Const, Am XIV; and then and there, after maliciously leaving Winter Charles Joseph Hill's unattended fallen and bleeding body at a place immediately inside the swinging kitchen doorway, as indicated in DEPOSITION EXHIBIT 1 (Exhibit 17), defendant Montville, Jr. exited DECKERS LANDING BAR RESTAURANT and, after radioing for "EMS,", "back-up" and defendant Canode, re-entered DECKERS LANDING BAR RESTAURANT and radio communicated, and acted, with defendants Weston and Witherspoon, Sr., as indicated in Exhibits 12 and 13; and, then and there, defendant Montville, Jr. again exited DECKERS LANDING BAR RESTAURANT by way of the "DOORS" as indicated in plaintiff's "Exhibit No. 2 Witness Diagram" (Exhibit 18) as referred to at page 10 of plaintiff's July 9, 1998 deposition.

7. The Canode Exhibit No. 6 (Exhibit 19) is a copy of a Certificate Of Persons conducting Business Under Assumed Name concerning the joint ownership of Theodore Horeftis and David Gwyn of a business enterprise named: DECKERS LANDING BAR MARINA BOAT LIVERY RESTAURANT & GAS STATION located at 9081 Anchor Bay Drive in the Township of Clay; and for several boat livery seasons, beginning in 1996, plaintiff and her then husband, Vernon Forrester, seasonally rented their 24' cabin cruiser livery space at DECKERS LANDING MARINA BOAT LIVERY & GAS STATION whereby, altogether,

(1) the plaintiff became acquainted with David Gwyn

and the manner and method in which he operated and conducted the DECKERS LANDING MARINA BOAT LIVERY & GAS STATION business enterprise which, among other things, included the employment and housing of Winter Charles Joseph Hill [the same Winter Charles Joseph Hill referred to throughout the 33-page so-called: "WINTER CHARLES JOSEPH HILL SWORN STATEMENT OF Michael Horeftis" (Exhibit 20)] with whom the plaintiff, beginning in 1996, became personally, and then evermore emotionally and intimately, acquainted; and

(2) the plaintiff became acquainted with Theodore Horeftis and the manner and method in which he domineeringly operated and conducted the DECKERS LANDING BAR RESTAURANT business enterprise: and

(3) the plaintiff became acquainted with Michael Horeftis [the same Michael Horeftis referred to in Exhibit 20] and the manner and method in which, for his domineering father (Theodore Horeftis), he, as an evermore hopeless heroin addict, managed the DECKERS LANDING BAR RESTAURANT business enterprise, including the 1996-1997 seasonal employment of the plaintiff as a DECKERS LANDING BAR RESTAURANT bar/waitress; and

(4) the plaintiff became acquainted with Leslie Gene Hasler (the grandson of Theodore Horeftis and nephew of Michael Horeftis) who, throughout the 1996-1997 DECKERS LANDING BAR MARINA BOAT LIVERY RESTAURANT & GAS STATION business enterprise seasons, became an evermore hopeless drug addict and an evermore prosperous drug dealer by reason of his drug-dealing association with one Mike Bourlier; and the said Leslie Gene Hasler is

(a) the "RED" referred to at pages 3 and 5 of Exhibit 1; and

(b) the "LESLIE ("GUY") HASLER" referred to at page 7 of defendant Waite's 11-page so-called "Burglary

Forced Entry" Michigan Department of State Police SUPPLEMENTAL INCIDENT REPORT (Exhibit 21); and

(c) the "LESLIE HASLER (GUY)" and the "HASLER" referred to at page 9 of Exhibit 21; and

(d) the "HASLER" referred to at page 10 of Exhibit 21; and

(e) the "short stocky individual . . . about five six, five seven" referred to at page 23 of the June 30, 1998 deposition of Lawrence Grice (Exhibit 22); and Mike Bourlier is the "MIKE" referred to at page 5 of Exhibit 21, and the "MIKE BOURLIER" referred to at page 6 and 8 of Exhibit 21, and the "MIKE" referred to at page 4 of Exhibit 1.

8. On Saturday, June 21, 1997, beginning at about 7:30 p.m. and until about midnight, the plaintiff, together with Winter Charles Joseph Hill [the "Charlie" referred to throughout Exhibit 22, and the 'CHARLIE" referred to at pages 2-11 of Exhibit 21, and the "Charlie" referred to at pages 10 and 11 of Rachelle Guenther's deposition (Exhibit 23), and the "Charlie referred to at pages 3-5 of Exhibit 1] and Matthew Joseph Franklin and Rachelle Guenther attended a gathering at DECKERS LANDING BAR RESTAURANT to commemorate the birthday of Matthew Joseph Franklin's father; and from about 7:30 p.m. until about 1 a.m. on Sunday, June 22, 1997, Winter Charles Joseph Hill was in his usual boyish "Charlie Brown" good spirit at DECKERS LANDING BAR RESTAURANT drinking his favorite Absolute, orange juice and Budweiser beer and going about DECKERS LANDING BAR RESTAURANT unsuccessfully arranging another gathering to celebrate his successful drug-addiction counseling and to inform his best co-employee friends (Rachelle Guenther and Matthew Joseph Franklin) of his decision to leave his DECKERS LANDING BAR MARINA BOAT LIVERY RESTAURANT & GAS STATION employment and become a full-time associate with his father in his home repair and lawn and garden maintenance

occupations; and from about 1 a.m. until about 2 a.m. on Sunday, June 22, 1997, Winter Charles Joseph Hill became very disagreeably involved in argumentative conversations with Leslie Gene Hasler and Michael Horeftis concerning Hasler's dissatisfaction with Winter Charles Joseph Hill's failure to pay overdue drug debts to Mike Bourlier and his (Hasler's) dissatisfaction with both Mike Horeftis and his bookkeeper wife for their failures to pay to Hasler his overdue share of his drug-dealing enterprise conducted at DECKERS LANDING BAR RESTAURANT; and, fROm about 2 a.m. until about 3 a.m., Winter Charles Joseph Hill, Matthew Joseph Franklin, Mike Horeftis and plaintiff closed up DECKERS LANDING BAR RESTAURANT and prepared the premises for the 10 a.m. breakfast brunch; and, from about 3 a.m. until about 3:15 a.m., Winter Charles Joseph Hill, Michael Horeftis and plaintiff stood outside said premises at Michael Horeftis' van while Winter Charles Joseph Hill and Michael Horeftis argumentatively discussed Michael Horeftis' insistence that Winter Charles Joseph Hill accompany him to Mike Bourlier's residence so that he (Michael Horeftis) could, once and for all, settle up Winter Charles Joseph Hill's drug debts to Mike Bourlier; and, at about 3:15 a.m., plaintiff watched Michael Horeftis and Winter Charles Joseph Hill drive off in Michael Horeftis' van to Mike Bourlier's residence with a certain misgiving about Winter Charles Joseph Hill because she knew that he himself wanted to settle up his drug debts to Mike Bourlier; and, momentarily after 3:15 a.m., plaintiff walked to and atop her docked cabin cruiser where she sat, for about 10 minutes, when surprisingly, she saw Winter Charles Joseph Hill exit from Michael Horeftis' van and walk toward Leslie Gene Hasler's DECKERS LANDING BAR RESTAURANT residence; and plaintiff then went into her cabin cruiser where, then and thereafter on Sunday, June 22, 1997, the plaintiff was a person who was not only constitutionally entitled to the US Const, Am IV, right to be

secure in her person against unreasonable search and seizure, but she was a person constitutionally entitled to the "shocks the conscience" - substantive due process right concerning police officers' action and conduct which offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous crimes," as guaranteed by the Due Process Clause of US Const, Am XIV.

9. At about 3:30 a.m. on Sunday, June 22, 1997, plaintiff, while in her docked cabin cruiser arguing with Vernon Forrester, heard a DECKERS LANDING BAR RESTAURANT audible alarm prompting her to walk from her cabin cruiser to the end of the dock where she heard the alarm stop - whereupon plaintiff returned to her cabin cruiser where, in a matter of minutes, she again heard said audible alarm prompting plaintiff again to walk to the end of the dock where again she heard said audible alarm stop; and plaintiff again returned to her cabin cruiser; and, at about 3:45 a.m., plaintiff again heard the audible alarm and the sound of two gunshots prompting her anxiously to walk to the end of the dock where she saw the second story DECKERS LANDING BAR RESTAURANT lights go on and off prompting her more anxiously to walk to a certain telephone pole pay phone located some 60' to the rear of the northeast corner of DECKERS LANDING BAR RESTAURANT where she began dialing 911 when she saw defendant Montville, Jr.'s Clay Township police vehicle parked at the east side of DECKERS LANDING BAR RESTAURANT - whereupon plaintiff began hesitantly walking toward the northeast corner of DECKERS LANDING BAR RESTAURANT where, then and there, she became terrorized and detained by the sight of a police officer (defendant Montville, Jr.) who, acting under color of state law, unreasonably, intentionally, recklessly and maliciously, and in a manner of police officer conduct which was both extreme, in degree, and outrageous, in character, running

from DECKERS LANDING BAR RESTAURANT, by way of the "DOORS" referred to in paragraph 6, holding in his outstretched and trembling hands his Sig-Sauer 9mm (model 226) deadly force weapon pointed, which is to say aimed, at the plaintiff while defendant Herman Montville, Jr. yelled to the terrified plaintiff; "Do you have anything to do with this?" - whereupon, almost instantly, Michael Horeftis drove his van to a stop nearby the plaintiff and yelled, from his van, to defendant Herman Montville, Jr.: "No, she rents a boat well here," and, then and there, defendant Herman Montville, Jr. began walking slowly and deliberately toward the terrified plaintiff and, while holding in his outstretched and trembling hands his Sig-Sauer 9mm (model 226) deadly force weapon pointed, which is to say aimed, at the plaintiff's stomach saying to the terrified plaintiff: "I had no choice but to shoot him. He wouldn't move away from the bar. He wouldn't do what I told him to do and I killed him." and, twice further and in a trembling voice, saying: "I didn't have no choice. I killed him;" and, there and then when defendant Montville, Jr., as he slowly walked to within 8' or so from the terrified plaintiff, still pointing, which is to say aiming, his deadly force weapon at the plaintiff's stomach, the plaintiff was further terrorized by the sight of Leslie Géne Hasler running from around the northwest corner of DECKERS LANDING BAR RESTAURANT and directly between the plaintiff and defendant Montville, Jr.; and then, in a matter of seconds, the plaintiff was further terrorized and detained by the sight of another police officer (the defendant Phillip L. Witherspoon, Sr.), acting under color of state law, unreasonably, intentionally, recklessly and maliciously, and in a manner of police officer conduct which was both extreme, in degree, and outrageous, in character, running toward the plaintiff with a police officer flashlight in his outstretched right hand and yelling at the terrified plaintiff: "Do you have anything to do with this?" and, then and there, the defendants Witherspoon,

Sr. and Montville, Jr. ordered the terrified plaintiff to stand, with her hands raised, at Michael Horeftis' van while they immediately entered DECKERS LANDING BAR RESTAURANT; and, then there and all the while that the terrified plaintiff, for upwards of an hour and a half, stood detained, which is also to say seized, intermittently with her hands raised and lowered, at Michael Horeftis' van, altogether in violation of the plaintiff's U.S. Const, Am IV and AM XIV, rights to be secure in her person against unreasonable search and seizure and against police officers' conduct which offend those "canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses" - all the while that the defendants Schaible, Rummel and Canode arrived at DECKERS LANDING BAR RESTAURANT in their various Clay Township police vehicles and, under color of state law, intentionally, recklessly, and maliciously, and in a manner of police officers' conduct which was both extreme, in degree, and outrageous, in character, variously entered and exited DECKERS LANDING BAR RESTAURANT, together with the defendants Montville, Jr., Witherspoon, Sr. and Weston, entered and exited and re-entered and re-exited DECKERS LANDING BAR RESTAURANT for the purpose of fabricating a police officer investigatory so-called: "Breaking and Entering/Fatal Police shooting" homicidal deadly force crime scene.

10. At about 5:30 a.m. on Sunday, June 22, 1997, the plaintiff was unreasonably, intentionally, recklessly and maliciously, and in a manner both extreme, in degree, and outrageous, in character, ordered by the defendant James Haggerty, acting under color of state law, into the front passenger seat of his Michigan State police officer vehicle where the plaintiff was maliciously detained and maliciously confined, which is also to say seized, by the defendant James Haggerty for upwards of three hours or so - all the while that the defendant James

Haggerty, acting under color of state law, unreasonably, intentionally, recklessly and maliciously, and in a manner of police officer conduct which was both extreme, in degree, and outrageous, in character, intermittently:

(1) maliciously hounded the terrified plaintiff with his maliciously repetitious inquisitorial interrogation of what the terrified plaintiff had to do with the shooting of Winter Charles Joseph Hill - all the while the terrified plaintiff was suffering asthmatic breathing attacks; and

(2) repeatedly entered and repeatedly exited DECKERS LANDING BAR RESTAURANT whereby he (the defendant James Haggerty), together with the defendants Steve Nowicki, Michael Waite, Kenneth L. Canode, Graham Rummel and Dennis Schaible fabricated an investigatory so-called "Burglary Forced Entry" homicidal deadly force crime scene and whereby, altogether, the defendant James Haggerty not only violated the plaintiff's Us Const, Am IV, right to be secure in her person against unreasonable search and seizure, but also her US const, Am XIV, "shocks the conscience" - substantive due process right to be secure from police officers' conduct which offend those "canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous crimes."

11. As the result and consequence of the aforestated police officers' conduct of the defendants Kenneth L. Canode, Graham Rummel, Dennis Schaible, Phillip L. Witherspoon, Sr., Herman E. Montville, Jr., Mark Weston, James Haggerty, Steve Nowicki and Michael Waite, the plaintiff was caused, then and there and thereafter to the present day, to suffer such acutely painful severe emotional distress as to result in the plaintiff's bodily harm, namely: the daily aggravation of her pre-existing disease commonly known as bipolar manic-depressive disorder.

Wherefore, plaintiff Laura Etta Stanley requests a trial by

jury and demands:

(1) a compensatory 42 USC § 1983 damages judgment against the defendants Herman E. Montville, Jr., Phillip L. Witherspoon, Sr. and James Haggerty in the amount of $5,000,000; and

(2) a punitive 42 USC § 1983 damages judgment against the defendants Herman E. Montville, Jr., Phillip L. Witherspoon, Sr., and James Haggerty in the amount of $5,000,000; and

(3) an award of 42 USC § 1988 attorney's fees; and

(4) a compensatory Restatement, Second, Torts, § 46(1)/ 28 USC § 1331 damages judgment against the defendants Township of Clay, Kenneth L. Canode, Herman E. Montville, Jr., Graham Rummel, Dennis Schaible, James Haggerty, Michael Waite, Steve Nowicki, Phillip L. Witherspoon, Sr., and Mark Weston in the amount of $5,000,000; and

(5) a punitive or exemplary Restatement, Second, Torts § 46(1)/28 USC § 1331 damages judgment against the defendants Township of Clay, Kenneth L. Canode, Herman E. Montville, Jr., Graham Rummel, Dennis Schaible, James Haggerty, Michael Waite, Steve Nowicki, Phillip L. Witherspoon, Sr., and Mark Weston in the amount of $5,000,000.

COUNT TWO

Plaintiff Suezette A. Minder's Restatement
Second, Torts § 46(1)/28 USC § 1331
Consolidated Amended Complaint

1. Plaintiff Suezette A. Minder is the half blood "sister" referred to in the TIMES HERALD (front page, June 24, 1997) newspaper publication which is Exhibit 5 of Laura Etta Stanley's consolidated amended complaint; and plaintiff Suezette A. Minder's half blood brother, Winter Charles Joseph Hill, is the "VICTIM: NAME: WINTER CHARLES JOSEPH HILL" referred to at page 3 of defendant James A. Haggerty's 5-page so-

called "BURGLARY FORCED ENTRY" Michigan Department of State Police ORIGINAL INCIDENT REPORT which is Exhibit 1 of Laura Etta Stanley's consolidated amended complaint.

2. Plaintiff incorporates by reference each and every allegation stated and contained in paragraph 2 of Laura Etta Stanley's consolidated amended complaint.

3. Plaintiff incorporates by reference each and every allegation stated and contained in paragraph 3 of Laura Etta Stanley's consolidated amended complaint.

4. Plaintiff incorporates by reference each and every allegation stated and contained in paragraph 4 of Laura Etta Stanley's consolidated amended complaint.

5. Plaintiff incorporates by reference each and every allegation stated and contained in paragraph 5 of Laura Etta Stanley's consolidated amended complaint.

6. On Sunday, June 22, 1997, at about 10 minutes or so following the "3:32 a.m." time referred to at page 2 of Exhibit 1, and while the plaintiff's half blood brother was seated on a DECKERS LANDING BAR RESTAURANT bar stool, the defendant Herman E. Montville, Jr., acting under color of state law, entered DECKERS LANDING BAR RESTAURANT in an unreasonable search for a fabricated so-called "BURGLARY FORCED ENTRY" - "suspect," and, then and there, and as a proximate result of the intentional, reckless and maliciously extreme, in degree, and outrageous, in character, policy of the defendant township's contractually employed policymaker - police chief (defendant Kenneth L. Canode), the defendant Herman E. Montville, Jr. walked some 30'8" inside DECKERS LANDING BAR RESTAURANT onto a certain ceramic flooring area within a few feet from two metal swinging kitchen doors; and, then and there, the defendant Herman E. Montville, Jr., acting under color of state law, unreasonably, intentionally, recklessly and malicoiusly, and in a manner of police officer conduct which was extreme, in degree, and outrageous, in character, shot the

plaintiff's half blood brother with his (defendant Montville, Jr.'s) deadly force Sig-Sauer 9 mm (model P226) weapon thereby, altogether, not only inflicting plaintiff's half blood brother's homicidal "Gunshot Wound of Abdomen" injury but also unreasonably seizing the plaintiff's half blood brother, altogether in violation of both US Const, Am IV and the Due Process Clause of US Const, Am XIV; and, then and there, after maliciously leaving plaintiff's half blood brother's unattended fallen and bleeding body at a place immediately inside the said swinging kitchen doorway, the defendant Herman E. Montville, Jr. exited DECKERS LANDING BAR RESTAURANT and, after radioing for "EMS," for "back-up" and for defendant Canode, re-entered DECKERS LANDING BAR RESTAURANT and radio communicated, and acted, with the defendants Mark Weston and Phillip L. Witherspoon, Sr., as indicated in Exhibits 12 and 13 of Laura Etta Stanley's consolidated amended complaint.

7. Plaintiff incorporates by reference each and every allegation stated and contained in paragraph 9 of Laura Etta Stanley's consolidated amended complaint.

8. On Sunday, June 22, 1997, at about 11 a.m. and after earlier returning from River District Hospital where the plaintiff saw her half blood brother's dead body being zipped up in a leather or canvas container for shipping to the morgue for autopsy, the plaintiff, in the company of her husband, entered into DECKERS LANDING BAR RESTAURANT and walked to within a few feet from the DECKERS LANDING BAR where the plaintiff saw, to her instant shock and horror, the DECKERS LANDING RESTAURANT blood-spattered kitchen-door frame, causing plaintiff, then and there and thereafter to this day, daily to suffer such acutely painful severe emotional distress as to result in the plaintiff's bodily harm, namely: a continuous daily aggravation of her pre-existing disease commonly known as Crohn's disease, altogether as a result and consequence

of the intentional, reckless and malicious defendant police officers' (Herman E. Montville, Jr., Phillip L. Witherspoon, Sr., Mark Weston, Kenneth L. Canode, Graham Rummel, Dennis Schaible, James Haggerty, Steve Nowicki and Michael Waite) conduct, which was extreme, in degree, and outrageous, in character, acting in concert one with another, causing not only:

(1) the immediate, continuing and total seclusion of the defendant Herman E. Montville, Jr. from St. Clair County prosecutorial homicide investigation; and

(2) the fabrication of the "COMPLAINANT Chief Kenneth Canode" - "Nowicki" - "Rummel" - "Breaking and Entering/Fatal Police Shooting" deadly force homicidal crime scene (Exhibit 24); and

(3) the fabrication of the so-called "BURGLARY FORCED ENTRY" police officer investigation; and

(4) the fabrication of the defendant Montville, Jr.'s so-called "self defense" police officer investigation; and

(5) various 'public relations' newspaper publications whereby the plaintiff's brother was incriminated, villainized, maligned and disparaged; but also, altogether, to cause

(6) plaintiff Suezette A. Minder daily to suffer such acutely painful severe emotional distress as to result in her bodily harm, namely: the daily aggravation of her pre-existing disease commonly known as Crohn's disease.

Wherefore, plaintiff Suezette A. Minder requests a trial by jury and demands:

(1) a compensatory Restatement, Second, Torts § 46(1)/28 USC § 1331 damages judgment against the defendants Township of Clay, Kenneth L. Canode, Herman E. Montville, Jr., Graham Rummel, Dennis Schaible, Phillip L. Witherspoon, Sr., Mark Weston, James Haggerty, Steve Nowicki and Michael Waite in the amount of $5,000,000; and

(2) a punitive or exemplary Restatement, Second, Torts § 46(1)/28 USC 1131 damages judgment against the defendant

Township of Clay and the police officer defendants Canode, Montville, Jr., Rummel, Schaible, Witherspoon, Sr., Weston, Haggerty, Nowicki and Waite in the amount of $5,000,000.

COUNT THREE

Plaintiff Winter Randolph Joseph Hill's Individual Restatement, Second, Torts § 46(1)/28 USC § 1331

Consolidated Amended Complaint

1. Plaintiff Winter Randolph Joseph Hill is the "FATHER" referred to in the TIMES HERALD (front page, June 24, 1997) newspaper publication which is Exhibit 5 of Laura Etta Stanley's consolidated amended complaint; and plaintiff Winter Randolph Joseph Hill's son, Winter Charles Joseph Hill, is the "VICTIM: NAM: WINTER CHARLES JOSEPH HILL" referred to at page 3 of defendant James Haggerty's 5-page so-called "BURGLARY FORCED ENTRY" Michigan Department of State Police ORIGINAL INCIDENT REPORT which is Exhibit 1 of Laura Etta Stanley's consolidated amended complaint.

2. Plaintiff incorporates by reference each and every allegation stated and contained in paragraph 2 of Laura Etta Stanley's consolidated amended complaint.

3. Plaintiff incorporates by reference each and every allegation stated and contained in paragraph 3 of Laura Etta Stanley's consolidated amended complaint.

4. Plaintiff incorporates by reference each and every allegation stated and contained in paragraph 4 of Laura Etta Stanley's consolidated amended complaint.

5. Plaintiff incorporates by reference each and every allegation stated and contained in paragraph 5 of Laura Etta Stanley's consolidated amended complaint.

6. On Sunday, June 22, 1997, at about 10 minutes or so following the "3:32 a.m." time referred to at page 2 of Exhibit

1 and while the plaintiff's son was seated on a DECKERS LANDING BAR RESTAURANT bar stool, the defendant Herman E. Montville, Jr., acting under color of state law, entered DECKERS LANDING BAR RESTAURANT in an unreasonable search for a fabricated so-called "BURGLARY FORCED ENTRY" - "suspect:" and, then and there, and as a proximate result of the intentional, reckless and maliciously extreme, in degree, and outrageous, in character, policy of the defendant township's contractually employed policymaker-police chief (defendant Kenneth L. Canode), the defendant Herman E. Montville, Jr. walked some 30'8" inside DECKERS LANDING BAR RESTAURANT onto a certain ceramic flooring area within a few feet from two metal swinging kitchen doors; and, then and there, the defendant Herman E. Montville, Jr., acting under color of state law, unreasonably, intentionally, recklessly and maliciously, and in a manner of police officer conduct which was extreme, in degree, and outrageous, in character, shot the plaintiff's son with his (defendant Montville, Jr.'s) deadly force Sig-Sauer 9mm (model P226) weapon thereby, altogether, not only inflicting plaintiff's son's homicidal "Gunshot Wound of Abdomen" injury but also unreasonably seizing the plaintiff's son, altogether in violation of both US Const, Am IV, and the Due Process Clause of US Const, Am XIV; and, then and there, after maliciously leaving plaintiff's son's unattended and fallen and bleeding body at a place immediately inside the said swinging kitchen doorway, the defendant Herman E. Montville, Jr. exited DECKERS LANDING BAR RESTAURANT and, after radioing for "EMS", for "back-up" and for defendant Kenneth L. Canode, re-entered DECKERS LANDING BAR RESTAURANT and radio communicated, and acted, with the defendants Mark Weston and Phillip L. Witherspoon, Sr., as indicated in the Exhibits 12 and 13 of Laura Etta Stanley's consolidated amended complaint.

7. Plaintiff incorporates by reference each and every alle-

gation stated and contained in paragraph 9 of Laura Etta Stanley's consolidated amended complaint.

8. At about 11 a.m. on Sunday, June 22, 1997, the plaintiff, after returning from Port Huron Hospital where he, to his instant shock and horror, observed and identified his son's bloated and disfigured dead body, telephoned the so-called "Clay Police Department" requesting a female dispatcher to speak to defendant Kenneth L. Canode concerning the shooting and killing of plaintiff's son; and she (the dispatcher) advised plaintiff that she would call defendant Kenneth L. Canode or the sergeant on duty (defendant Graham Rummel) so that one or the other of them would call the plaintiff; and some four hours later at about 3 p.m., the defendant James Haggerty telephoned the plaintiff and advised him that he (defendant James Haggerty) could not discuss the shooting and killing of plaintiff's son because he (defendant Haggerty) was investigating the "incident;" and plaintiff, the and there and for years theretofore, knew that defendants Kenneth L. Canode and James Haggerty were police officer cronies seeking, in their concerted ways, federal-state funding for the employment of additional Township of Clay and state police officers.

9. On Sunday, June 22, 1997, beginning at the "0345" time indicated in the Exhibit 1 of Laura Etta Stanley's consolidated amended complaint, the defendant township's contractually employed policymaker-police chief (defendant Kenneth L. Canode), together with the police officer defendants Herman E. Montville, Jr., Graham Rummel, Dennis Schaible, Phillip L. Witherspoon, Sr., Mark Weston, James Haggerty, Steve Nowicki and Michael Waite, undertook a concerted course of intentional, reckless and maliciously extreme, in degree, and outrageous, in character, police officer conduct causing not only:

(1) the immediate, continuing and total seclusion of the defendant Herman E. Montville, Jr. from St. Clair County

prosecutorial homicide investigation; and

(2) the fabrication of the "COMPLAINANT Chief Kenneth Canode" - "Nowicki" - "Rummel" - "Breaking and Entering/Fatal Police Shooting" deadly force homicidal crime scene (Exhibit 24); and

(3) the fabrication of the so-called "BURGLARY FORCED ENTRY" police officer investigation; and

(4) the fabrication of defendant Montville, Jr.'s so-called "self defense" police officer investigation; and

(5) various 'public relations' newspaper publications whereby the plaintiff's son was incriminated, villainized, maligned and disparaged, but also , altogether, to cause

(6) the plaintiff Winter Randolph Joseph Hill daily to suffer such acutely painful sever emotional distress as to result in his bodily harm, namely: a daily aggravation of the plaintiff's pre-existing low-back, left leg muscle spasm injury.

Wherefore, plaintiff Winter Randolph Joseph Hill requests a trial by jury and demands;

(1) a compensatory Restatement, Second, Torts § 46(1)/ 28 USC § 1331 damages judgment against the defendants Township of Clay, Kenneth L. Canode, Herman E. Montville, Jr., Graham Rummel, Dennis Schaible, Phillip L. Witherspoon, Sr., Mark Weston, James Haggerty, Steve Nowicki and Michael Waite in the amount of $5,000,000; and

(2) a punitive or exemplary Restatement, Second, Torts § 46(1)/28 USC § 1331 damages judgment against the defendants Township of Clay, Kenneth L. Canode, Herman E. Montville, Jr., Graham Rummel, Dennis Schaible, Phillip L. Witherspoon, Sr., Mark Weston, James Haggerty, Steve Nowicki and Michael Waite in the amount of $5,000,000.

Appendix C

COUNT FOUR

Plaintiff Personal Representative's
42 USC § 1983 Consolidated Amended Complaint Against
Defendants Township of Clay, Canode and Montville, Jr.

1. Plaintiff Winter Randolph Joseph Hill, by Letters of Authority (Exhibit 25), is the Personal Representative of the Estate of Winter Charles Joseph Hill, Deceased; and the deceased Winter Charles Joseph Hill is the "decedent" indicated in the Certificate of Death 1324492 (Exhibit 16); and on Sunday, June 22, 1997, the day and date of Winter Charles Joseph Hill's homicidal death resulting from his homicidal deadly force "Gunshot Wound of Abdomen" injury, as indicated in said death certificate (Exhibit 16) was a person who was not only constitutionally entitled to the US Const, Am IV, right to be secure in his person against unreasonable search and seizure, but he was also a person who was constitutionally entitled to the "shocks the conscience" - substantive due process right, a right concerning a police officer's homicidal deadly force action and conduct which offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses," as guaranteed by the Due Process Clause of US Const, Am XIV, and as authoritatively described in Wilson v Beebe, 770 F2d 578, 581-586 (CA 6, 1985), citing Tennessee v Garner, 471 US 1 (1985).

2. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 2 of Laura Etta Stanley's consolidated amended complaint.

3. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 3 of Laura Etta Stanley's consolidated amended compliant.

4. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 4 of Laura Etta Stanley's consolidated amended complaint

5. On Sunday, June 22, 1997, at a time hardly more than a moment or so preceding the "0350" time of Winter Charles Joseph Hill's homicidal "Gunshot Wound of Abdomen" injury, as indicated in said death certificate (Exhibit 16), and while Winter Charles Joseph Hill was seated on a DECKERS LANDING BAR RESTAURANT bar stool, the defendant Herman E. Montville, Jr., under color of state law, and as a proximate cause of the policy and practice and custom of the defendant township's contractually employed policymaker-police chief, as stated in paragraph 4 of Laura Etta Stanley's consolidated amended complaint, entered DECKERS LANDING BAR RESTAURANT in an unreasonable search for a so-called 'BURGLARY FORCED ENTRY" - suspect;" and, then and there, defendant Herman E. Montville, Jr. walked some 30'8" into DECKERS LANDING BAR RESTAURANT onto a certain ceramic flooring area to within a few feet from two metal swinging kitchen doors; and, then and there, defendant Herman E. Montville, Jr., under color of state law, unreasonably and maliciously shot, wounded and killed, which is also to say seized, Winter Charles Joseph Hill with his (defendant Montville, Jr.'s) Sig-Sauer 9mm (model 226) deadly force weapon thereby not only inflicting Winter Charles Joseph Hill's homicidal "Gunshot Wound of Abdomen" injury but also unreasonably and maliciously seizing Winter Charles Joseph Hill, altogether in violation of US Const, Am IV; and, then and there, after unreasonably and maliciously leaving Winter Charles Joseph Hill's unattended fallen body immediately inside the said swinging kitchen doorway, the defendant Herman E. Montville, Jr. exited DECKERS LANDING BAR RESTAURANT and, after radioing for "EMS," for "Back-up" and for defendant Canode,

re-entered DECKERS LANDING BAR RESTAURANT and radio communicated, and acted, with the defendants Mark Weston and Phillip L. Witherspoon, Sr., indicated in Exhibits 12 and 13 of Laura Etta Stanley's consolidated amended complaint, altogether in violation of the Due Process Clause of US Const, Am XIV; and, then and there, the defendant Herman E. Montville, Jr. again exited DECKERS LANDING BAR RESTAURANT and, then and there,

(1) he (defendant Montville, Jr.) ran toward the northeast corner of DECKERS LANDING BAR RESTAURANT and , all the while he allowed Winter Charles Joseph Hill's unattended fallen body to bleed to death, he yelled at Laura Etta Forrester, who was some sixty feet or so behind the northeast corner of DECKERS LANDING BAR RESTAURANT, : "Do you have anything to do with this?"; and, then and there,

(2) he (defendant Montville, Jr.) said to Laura Etta Forrester: "I had no choice but to shoot him. He wouldn't move away from the bar. He wouldn't do what I told him to do and I killed him."; and, then and there,

(3) he (defendant Montville, Jr.) twice said to Laura Etta Forrester: "I didn't have no choice. I killed him."

Wherefore, Winter Randolph Joseph Hill, the Personal Representative of the Estate of Winter Charles Joseph Hill, requests a trial by jury and demands:

(1) a compensatory 42 USC § 1983 damages judgment against the defendants Township of Clay, Kenneth L. Canode and Herman E. Montville, Jr. in the amount of $5,000,000; and

(2) a punitive 42 USC § 1983 damages judgment against the defendants Township of Clay, Kenneth L. Canode and Herman E. Montville, Jr. in the amount of $5,000,000; and

(3) an award of 42 USC 1988 attorney's fee.

Appendix C

COUNT FIVE

Plaintiff Personal Representative's MCL 600.2922(6) Intentional-Bad Faith-Wrongful Act-Gross Negligence Complaint For Winter Charles Joseph Hill's Pain and Suffering while Conscious Between Time of Injury and Death

1. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 1 of his COUNT FOUR Consolidated Amended Complaint Against Defendants Township of Clay, Canode and Montville, Jr.

2. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 2 of Laura Etta Stanley's consolidated amended complaint.

3. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 3 of Laura Etta Stanley's consolidated amended complaint.

4. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 4 of Laura Etta Stanley's consolidated amended complaint.

5. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 5 of his COUNT FOUR consolidated amended complaint against the defendants Township of Clay, Kenneth L. Canode and Herman E. Montville, Jr.

Wherefore, Winter Randolph Joseph Hill, the Personal Representative of the Estate of Winter Charles Joseph Hill, Deceased, requests a trial by jury and demands:

(1) a compensatory MCL 600.2922(6) damages judg-

ment against the defendants Township of Clay, Kenneth L. Canode and Herman E. Montville, Jr. in the amount of $5,000,000 for the pain and suffering, while conscious, undergone by Winter Charles Joseph Hill during the period intervening between the time of his injury and death, altogether as therefor provided in MCL 600.2922(6); and

(2) an exemplary MCL 600.2922(6) damages judgment against the defendants Township of Clay, Canode and Montville, Jr. in the amount of $5,000,000 for the pain and suffering, while conscious, undergone by Winter Charles Joseph Hill during the period of time intervening between his injury and his death.

COUNT SIX

Plaintiff Personal Representative's MCL 600.2922(6)
Intentional-Bad Faith-Wrongful Act-Gross Negligence
Complaint For His Father's Loss of the Society and
Companionship of Winter Charles Joseph Hill, Deceased

1. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 1 of his COUNT FOUR consolidated amended complaint against defendants Township of Clay, Canode and Montville, Jr.

2. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 2 of Laura Etta Stanley's consolidated amended complaint.

3. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 3 of Laura Etta Stanley's consolidated amended complaint.

4. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragrpah 4 of Laura Etta Stanley's consolidated amended complaint.

5. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 5 of his COUNT FOUR consolidated amended complaint against the defendants Township of Clay, Kenneth L. Canode and Herman E. Montville, Jr.

Wherefore, Winter Randolph Joseph Hill, the Personal Representative of the Estate of Winter Charles Joseph Hill, Deceased, requests a trial by jury and demands:

(1) a compensatory MCL 600.2922(6) damages judgment against the defendants Township of Clay, Kenneth L. Canode and Herman E. Montville, Jr. in the amount of $5,000,000 for his father's loss of the society and companionship of his son, Winter Charles Joseph Hill, altogether as therefor provided in MCL 600.2922; and

(2) an exemplary MCL 600.2922(6) damages judgment against the defendants Township of Clay, Kenneth L. Canode and Herman E. Montville, Jr. in the amount of $5,000,000 for his father's loss of the society and companionship of his son, altogether as therefor provided in MCL 600.2922.

COUNT SEVEN

Plaintiff Personal Representative's MCL 600.2922(6)
Intentional-Bad Faith-Wrongful Act-Gross Negligence
Complaint for Suezette A. Minder's Loss
of the Society and Companionship of Her Half Blood Brother

1. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 1 of his COUNT FOUR consolidated amended complaint against defendants Township of Clay, Canode and Montville, Jr.

2. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 2 of Laura Etta Stanley's consolidated amended com-

plaint.

3. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 3 of Laura Etta Stanley's consolidated amended complaint.

4. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 4 of Laura Etta Stanley's consolidated amended complaint.

5. Plaintiff Personal Representative incorporates by reference each and every allegation stated and contained in paragraph 5 of his COUNT FOUR consolidated amended complaint against the defendants Township of Clay, Kenneth L. Canode and Herman E. Montville, Jr.

Wherefore, Winter Randolph Joseph Hill, the Personal Representative of the Estate of Winter Charles Joseph Hill, Deceased, requests a trial by jury and demands:

(1) a compensatory MCL 600.2922(6) damages judgment against the defendants Township of Clay, Kenneth L. Canode and Herman E. Montville, Jr. in the amount of $5,000,000 for Suezette A. Minder's loss of the society and companionship of her half blood brother, Winter Charles Joseph Hill, altogether as therefor provided in MCL 600.2922; and

(2) an exemplary MCL 600.2922(6) damages judgment against the defendant Township of Clay, Kenneth L. Canode and Herman E. Montville, Jr. in the amount of $5,000,000 for Suezette A. Minder's loss of the society and companionship of her half blood brother, Winter Charles Joseph Hill, altogether as therefor provided in MCL 600.2922.

Dated: October 23, 1998
(s) Robert J. Lord (P16797)
Attorney for plaintiffs

8388 Dixie Highway
Fair Haven, MI 48023
(810) 725-4231

APPENDIX D
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN , SOUTHERN DIVISION

CASE No. 97-76159 HONORABLE AVERN COHN

LAURA ETTA STANLEY, SUEZETTE A. MINDER, WINTER RANDOLPH JOSEPH HILL, individually and as personal representatives of the Estate of Winter Charles Joseph Hill, Deceased,

Plaintiffs

V.

TOWNSHIP OF CLAY, KENNETH L. CANODE, HERMAN MONTVILLE, JR., GRAHAM RUMMEL, DENNIS SCHAIBLE, PHILLIP LEE WITHERSPOON, SR., MARK WESTON, JAMES HAGGERTY, STEVE NOWICKI, and MICHAEL WAITE,

Defendants

MEMORANDUM AND ORDER

I. Introduction

This is an action under 42 U.S.C. § 1983 with pendent state law claims. In brief, plaintiffs claim the use of excessive force in the attempted arrest of Winter Charles Joseph Hill (decedent) resulted in his death.[1] Decedent's estate claims damages under 42 U.S.C. § 1983 and for wrongful death. Decedent's father and half-sister claim damages for loss of society and companionship. Decedent's friend claims damages for intentional infliction of emotional distress. Pursuant to the Memorandum

[1]The three different lawsuits that were filed have been consolidated under case number 97-76159.

and Order dated April 3, 1998, the claims of intentional infliction of emotional distress be decedent's father and half-sister were dismissed.

Defendants have filed two motions: (1) a motion to dismiss or in the alternative for summary judgment, and (2) a motion for sanctions and request for injunctive relief enjoining plaintiffs "from filing any further pleadings in this matter." The first motion will be treated as one for summary judgment. Plaintiffs request recusal under 28 U.S.C. § 455(a).

II. Recusal

The Court has reviewed plaintiffs' request for recusal pursuant to 28 U.S.C. 455(a), which plaintiffs note is a "self-executing provision."[2] See Roberts v. Bailar, 625 F. 2d 125, 128 (6th Cir. 1980). As discussed in Roberts:

> The standard now is objective. It asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge. "[I]f there is a reasonable factual basis for doubting the judge's impartiality," the congressional committee reports on the 1974 amendment to § 455 explain, the judge "should disqualify himself and let another judge preside over the case." Even where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial.

Id. at 129.

The Court has reviewed plaintiffs' papers in support of this request. Plaintiffs apparently rely on the Court's brief reference to a case litigated against plaintiffs' counsel some twenty-five years ago on the record at the hearing on April 1, 1998. A review of the transcript reveals that the Court was rejecting an argument made by defendants' counsel - in other words finding

[2]Under 28 U.S.C. § 455(a): "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

in favor of plaintiffs[3] - when it made brief reference to the twenty-five year old case. After making the reference, the Court expressly stated on the record that it held "no bias or animus" toward plaintiffs' counsel. The Court's impartiality cannot reasonably be questioned on this basis.

Plaintiffs also make reference to the Court's comments on the record at the hearing on September 28, 1998, which they perceive as harsh. Some harsh comment, however, was appropriate given the totality of the actions of plaintiffs' counsel in connection with this shooting incident. Plaintiffs filed a lawsuit in state court claiming damages for intentional infliction of emotional distress on behalf of decedent's father and Minder. The case in state court was dismissed and plaintiffs' counsel was sanctioned twice.[4]

Plaintiff's counsel has filed three separate actions in this Court claiming damages from the shooting incident.[5] None of the complaints complied with Fed. R. Civ. P. 8(a).[6] The hear-

[3]Indeed, plaintiffs' counsel acknowledged on the record that "you're doing pretty well for me."

[4]The St. Clair County Circuit Court's Order Granting Defendants' Motion for Sanctions dated June 24, 1998 (exhibit 3 to defendants' "Motion for Sanctions and Request for Injunctive Relief" filed November 9, 1998) stated:

> Defendants are entitled to sanctions against Plaintiffs' counsel, personally and for his continued unprofessional behavior as he demonstrated a willful violation of the rules by his continual filing of frivolous pleadings [and] noticing up depositions without consulting the defense counsel for availability.

Also, in an order dated July 20, 1998, plaintiffs' counsel was sanctioned "for the filing of meritless objections to the Order Denying Plaintiff's Motion For Disqualification of Judge Kelly and requiring Defendants to bring a Motion for Entry, the precise reasons for the court's award of sanctions being memorialized in the recorded opinion of the Court." See exhibit S to defendants' motion for summary judgment.

[5]Plaintiffs' counsel has filed an excessive number of pleadings in this case.

[6]Fed. R. Civ. P. 8(a) provides: "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." (Emphasis added).

ing on September 28, 1998 was on defendants' motion to dismiss the case, to which plaintiffs had not filed an adequate response. Although dismissal would not have been inappropriate at the time, the Court gave plaintiff an opportunity to file a consolidated amended complaint "alleging with particularity the wrongful act and how each of the individual defendants is liable for the wrongful act."

Plaintiffs' consolidated amended complaint did not comply with the Court's instructions or Fed. R. Civ. P. 8(a). Nonetheless, in a Memorandum and Order dated January 14, 1999, the Court gave plaintiffs another opportunity to respond to defendants' motion for summary judgment. The Court stated the material facts as gleaned from the papers in separately numbered paragraphs and ordered plaintiffs to respond to the facts stated in each paragraph. The Court explicitly noted: "If plaintiffs do not respond properly, the Court will decide the case on the facts as set forth above."

Rather than responding in accordance with the Court's instructions, plaintiffs filed objections pursuant to Fed R. Civ. P. 46, among other things. When viewed in this context, the Court's impartiality cannot reasonably be questioned. The Court has been patient by giving plaintiffs several opportunities to make their case. The Court must now rule on the motion on the record as it stands.[7]

---

[7]See Fed. R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, and adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.") (emphasis added); Interroyal Corp. v. Sponseller, 889 F 2d 108, 111 (6th Cir. 1989) ("A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim.").

III. The Parties

Plaintiff Winter Randolph Joseph Hill is the father of the decedent; he makes claims individually and as the personal representative of decedent's estate. Plaintiff Suezette Minder (Minder) is the half-sister of decedent. Plaintiff Laura Etta Stanley (Stanley) was a friend of decedent who was a bystander near the shooting scene.

Defendant Herman Montville, Jr. (Montville), a Clay Township Police Officer, shot decedent. Defendant Kenneth Canode (Canode) was the Chief of Police of defendant Clay Township at the time of the shooting. Defendants Graham Rummel (Rummel) and Dennis Schaible (Schaible) are Clay Township Police Officers. Defendants James Haggerty (Haggerty) and Michael Waite (Waite) are Michigan State Police investigators, and defendant Steve Nowicki (Nowicki) is a Michigan State Police Trooper. Defendants Phillip Lee Witherspoon (Witherspoon) and Mark Weston (Weston) are Algonac Police Officers.

IV. Statement of Material Facts

A.

The material facts are undisputed. The direct evidence is culled largely from the statements of Montville in an incident report (exhibit J to defendants' motion for summary judgment) and in his deposition (exhibit F to defendants' motion for summary judgment). There is no evidence in the record to suggest that Montville's statements are false or inaccurate.

The Statement of Material Facts that follows in subpart B is reproduced from the Memorandum and Order dated January 14, 1999. Although the Court ordered plaintiffs to respond to the facts stated in each paragraph, plaintiffs did not do so.

B.

1. Decker's Landing is comprised of three facilities: a restaurant/bar, an outdoor boat storage marina, and a marina.

2. Decedent Winter Charles Joseph Hill worked in the marina at Decker's Landing. Decedent did not work in the restaurant.

3. Decedent lived at Decker's Landing in a rented house.

4. Decedent was 6'2", weighed 220 pounds, and was thirty years old.

5. The owner of the restaurant at Decker's Landing set the alarm at 3:11 a.m. on June 22, 1997.

6. Decedent broke into the restaurant at Decker's Landing at 3:26 a.m. on June 22, 1997. Decedent had no authority to enter the restaurant at the time.

7. Officer Montville, who was on duty, was notified by Clay Township Dispatch at 3:29 a.m. on June 22, 1997 that a resident living near Decker's Landing heard a verbal alarm at the restaurant at Decker's Landing.

8. Montville is 5'8" and weighs 160 pounds.

9. Montville arrived at the restaurant about twenty minutes after he was dispatched. Montville parked at the tear of the building. Montville was wearing his uniform at the time.

10. Upon arriving, Montville heard the verbal alarm stating: "Burglary, burglary, burglary. You are in an alarmed area. The police have been notified. Please leave the premises."

11. Montville walked to the front of the building to the porch, which has unlocked doors. Montville walked into the building and found a double door, which had a deadbolt, that had been pushed open and substantially damaged. Montville also saw a screen adjacent to the left side of the door removed. The widow to the screen had been locked shut.

12. Montville entered the premises. It was dark inside.

13. Montville shined his flashlight toward the bar area, finding decedent sitting on a bar stool. Decedent was smiling at Montville. Decedent was twenty feet from Montville.

14. Decedent had his left hand on a table and his right hand deliberately behind his back.

15. Montville had never seen decedent before.

16. Montville drew his weapon upon seeing decedent.

17. Montville suspected decedent broke into the restaurant.

18. Under the circumstances, Montville reasonably believed that there may have been others in the restaurant.

19. Montville asked decedent to show his hands. Decedent then stood up from the bar stool, deliberately keeping his hand behind his back, and started walking rapidly toward Montville. Decedent continued to smile at Montville. Montville again asked decedent to show his hands. Decedent continued to walk toward Montville. Montville retreated backwards at the speed decedent approached him.

20 Decedent asked Montville to show his gun. Montville shined his flashlight, which he held in his left hand, on the gun held in his right hand.

21. Montville repeatedly asked decedent to show his hands. Decedent continued to walk toward Montville with his hand behind his back.

22. Montville retreated backwards to the steps leading from the porch into the restaurant. At the time, he was about ten to fifteen feet from decedent.

23. Decedent lunged at Montville.

24. Montville then fired one shot at the center of decedent's body. Decedent took a half-step forward, fell to his knees, and fell backwards. Decedent had nothing in his hand.

25. Montville decocked his weapon and holstered it. Montville called dispatch for back-up and for emergency medical treatment for decedent. Montville checked decedent's vital signs and determined decedent was still alive.

26. The time elapsed between Montville's entry to and exit from the bar was fourteen seconds.

27. Canode, Rummel, Nowicki, Schaible, Witherspoon, and Weston arrived at the scene after the shooting incident.

28. Plaintiff Stanley stood outside the restaurant and did

not witness the shooting.

29. The Michigan State Police performed and independent investigation of the incident.

30. The St. Clair County Prosecutor investigated the incident, and reviewed the Michigan State Police investigation. The St. Clair county Prosecutor concluded that Montville used reasonable force under the circumstances.

31. Plaintiffs did not dispute the findings of the St. Clair County Prosecutor.

32. A toxicology report revealed decedent had a blood alcohol level of .32, had cocaine in his blood steam, and marijuana in his body.

V. Motion for Summary Judgment

Summary judgment will be granted when the moving party demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." In re Dollar Corp., 25 F. 3d 1320, 1323 (6th Cir. 1994) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). In so doing, the Court "must view the evidence in the light most favorable to the non-moving party." Employers Ins. of Wausau v. Petroleum Specialties, Inc., 69 F. 3d 98, 101 (6th Cir. 1995).

VI. Excessive Force

Montville argues that he is entitled to qualified immunity

on the claim that he used excessive force. Before examining the reasonableness of Montville's conduct in light of a clearly established constitutional right, however, the Court must determine whether the excessive force claim has any merit.[8] See Siegert v. Gilley, 500 U.S. 226, 232 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.")

The excessive force claim is analyzed under the Fourth Amendment's "objectively reasonable" test. See Graham v. Connor, 490 U.S. 386, 394-95 (1989). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather that with the 20/20 vision of hindsight." Id. at 396.

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests'" against the countervailing governmental interests as stake. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. (citations omitted).

The excessive force claim has no merit. Montville entered

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[8] "The right to be free from excessive force is a clearly established right." Walton v. City of Southfield, 995 F 2d 1331, 1342 (6th Cir. 1993) (citing Holt v. Artis, 843 F. 2d 242, 246 (6th Cir. 1988)).

the dark restaurant twenty minutes after the alarm went off. Montville saw decedent, a person he had not seen before, sitting at the bar in the dark deliberately holding his right hand behind his back, all the while smiling at Montville. Although Montville drew his weapon and asked decedent to show his hands, decedent did not do so. Rather, decedent, who was six inches taller and sixty pounds heavier than Montville, stood up and began walking rapidly toward Montville. Decedent was smiling and kept his right hand behind his back as he walked toward Montville. As Montville retreated backwards to the steps leading from the porch into the restaurant, decedent lunged at Montville. Under the circumstances, Montville reasonably believed that decedent posed a threat to his safety. Thus, the firing of one shot at the center of decedent's body was not objectively unreasonable. "The use of deadly force is reasonable if an officer believes that there is a threat of serious physical harm to the officer or others." Brandenburg v Cureton, 882 F. 2d 211 (6th Cir. 1989) (citing Young v. City of Killeen, Tex., 775 F. 2d 1349, 1353 (5th Cir. 1985)). Accordingly, the excessive force claim will be dismissed.

VII. Other Claims

As noted, the claims for intentional infliction of emotional distress by decedent's father and half-sister were dismissed in the Memorandum and Order dated April 3, 1998. Stanley's claim of intentional infliction of emotional distress also fails because her alleged injury was not "fairly contemporaneous with the accident. "See Gustafson v. Faris, 67 Mich. App. 363, 369 (1976).

To the extent decedent's father, Minder, and Stanley bring independent claims under 42 U.S. C. § 1983 and Michigan's Wrongful Death Act, Mich. Comp. Laws Ann. § 600.2922, they are dismissed. Only the personal representative of an estate can assert these claims on behalf of the estate. See Robertson

v. Wegmann, 436 U.S. 584 (1978); Mich. Comp. Laws Ann. § 600.2922 (2).

To the extent there is a claim that the use of excessive force violated decedent's substantive due process rights, it is dismissed. See Haverstick Enters., Inc. v. Financial Federal Credit, Inc., 32 F. 3d 989, 996 (6th Cir. 1994) ("Cases in which a citizen has alleged that a police officer has used excessive force in effecting an arrest, or unreasonably 'seized' the person, are assessed under the Fourth Amendment 'objective reasonableness' standard, rather than a substantive due process standard.") (footnote omitted) (citing Graham v. Connor, 490 U.S. 386, 388 (1989)).

Plaintiffs' claim of municipal liability under § 1983 is dismissed because plaintiffs have not demonstrated the existence of an unconstitutional policy or custom. See City of St. Louis v. Praprotnik, 485 U.S. 112, 128 (1988). Likewise, plaintiffs' search and seizure and due process claims under the Michigan Constitution are dismissed. See, e.g., Jones v. Powell, 227 Mich. App. 662, 675-76 (1998).

To the extent there is a claim that Chief Canode is liable for improper supervision, it is dismissed because plaintiffs have not demonstrated that Chief Canode "encouraged the specific incident of misconduct or in some other way, directly participated in it." Lillard v. Shelby County Bd.of Ed., 76 F. 3d 716, 727 (6th Cir. 1996). The state law tort claims against Montville are dismissed on governmental immunity grounds. There is no evidence of "gross negligence" on the part of Montville. See Mich. Comp. Laws. Ann. 691.1407 (2).

The claims of loss of society and companionship by decedent's father and Minder are derivative of decedent's claims. Because decedent's claims fail, the claims for loss of consortium fail as well. See Francis v. Gaylord Container Corp., 837 f. Supp. 858, 864-65 (S.D. Ohio 1992), aff'd, No. 92-4287, 1993 WL 430133 (6th Cir. Oct. 22, 1993) (per curiam).

VIII. Conclusion

For the foregoing reasons, the Court finds recusal under 28 U.S.C. § 455(a) inappropriate. Defendants' motion for summary judgment is GRANTED. Defendants' motion for sanctions and injunctive relief is DENIED. This case is DISMISSED.

SO ORDERED.

Dated: Apr. 16, 1999
Detroit, Michigan

(s) AVERN COHN
UNITED STATES
DISTRICT JUDGE

APPENDIX E
UNITED STATES DISTRICT COURT EASTERN
DISTRICT OF MICHIGAN, SOUTHERN DIVISION

WINTER RANDOLPH JOSEPH HILL, etc., et al.,
Plaintiff,
JAMES HAGGERTY, et al.,
Defendants

HONORABLE AVERN COHN NO. 97-CV-76159
MOTION TO DISMISS
Monday, September 28, 1998

— — —

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— — —

Sheri K. Ward, RPR, Court Reporter
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 219
Detroit, Michigan 48226 (313) 965-4401
Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

Detroit, Michigan
Monday, September 28, 1998
2:12 p.m.

— — —

P-R-O-C-E-E-D-I-N-G-S

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THE CLERK: All rise. The United States District Court for the Eastern District of Michigan is now in session, the Honorable Avern Cohn presiding.

THE COURT: Be seated.

THE CLERK: Case Number 97-76159, Hill v. Haggerty.

THE COURT: Okay. Mr. Lord, you represent the plaintiffs, correct?

MR. LORD: Correct, Your Honor.

THE COURT: And my understanding is there are now five plaintiffs in all of these different cases?

MR. LORD: Yes.

THE COURT: Let's see. We have Minder, the half-sister; we have Hill, the father; we have Stanley, a friend. Right?

MR. LORD: Your Honor is referring to this most recent case?

THE COURT: Well, I'm looking at all of these cases as one.

MR. LORD: All right.

THE COURT: And we have Winter as personal representative, right?

MR. LORD: Correct.

THE COURT: Now, we have a multitude of defendants. Let's start with the Township of Clay. Who represents the Township?

MR. DALTON: Your Honor, I do, Daniel Dalton.

THE COURT: How do you spell your last name?

MR. DALTON: D-a-l-t-o-n.

THE COURT: I'm sorry, how?

MR. DALTON: D-a-l

THE COURT: D?

MR. DALTON: Yes.

THE COURT: Oh, Dalton?

MR. DALTON: Yes, Dalton.

THE COURT: Okay. And you also represent, let's see, Canode?

MR. DALTON: That's correct.

THE COURT: And he's the shooter?

MR. DALTON: No, he's the chief.

THE COURT: Oh, he's the chief. I'm sorry, you're right. Montville, he was the shooter.

MR. DALTON: He was the shooter, that's right.

THE COURT: Then we have Shommel -- no, Rummel?

MR. DALTON: Rummel is a sergeant. I represent him.

THE COURT: And you also represent Schaible?

MR. DALTON: Yeah.

THE COURT: Now, what did -- from your reading of the complaint, what did Rummel and Schaible do that was wrong?

MR. DALTON: Nothing, Your Honor.

THE COURT: Well, you're an officer of the court. Answer as an officer of the Court, amicus.

MR. DALTON: Sure. As I understand it and from my reading of the complaint of the plaintiff, plaintiff has alleged that Rummel and Schaible were engaged in a campaign along with all of the other individual defendants to --

THE COURT: Malign.

MR. DALTON: -- malign the deceased.

THE COURT: Who were they maligning?

MR. DALTON: Apparently, the deceased, Winter Charles Joseph Hill.

THE COURT: The deceased, okay. Now, we have Haggerty, right?

MR. DONNELLY: That's correct, Your Honor.

THE COURT: He's a Michigan State police officer, right?

MR. DONNELLY: Correct.

THE COURT: We have Waite, he's a Michigan State police officer?

MR. DONNELLY: Correct.

THE COURT: And we have Nowicki, he's a Michigan State police officer, right?

MR. DONNELLY: That's also correct.

THE COURT: And what did they allegedly do wrong?

MR. DONNELLY: Well, candidly, Your Honor, I'm not sure.

THE COURT: You're Mr. --

MR. DONNELLY: Mr. Donnelly.

THE COURT: -- Donnelly. Do you work for Friedman in the Attorney General's office?

MR. DONNELLY: No, I do not.

THE COURT: He takes a jaundice view of judges asking questions like this.

MR. DONNELLY: Really? No, he heads up the corrections division.

THE COURT: All right. Now, as an officer of the court what did they allegedly do wrong?

MR. DONNELLY: Frankly, Your Honor, I'm not sure. Detective Haggerty was the lead investigator for the Michigan State Police into the shooting of the deceased.

THE COURT: Okay.

MR. DONNELLY: He conducted an investigation with some assistance from Trooper Nowicki and Detective Sergeant Waite.

THE COURT: Okay. So they assisted?

MR. DONNELLY: Yes, they assisted.

THE COURT: Okay. Now we have Witherspoon and Weston. They are from Algonac, right?

MR. DALTON: That's right, Your Honor, and I will be

representing them.

MR. LORD: You will?

MR. DALTON: Yes.

THE COURT: And what did they do wrong?

MR. DALTON: According to the compliant, they were -- after the shooting they came to the scene and --

THE COURT: Assisted in the investigation?

MR. DALTON: Yes.

THE COURT: Okay. Now, what motion precisely is before the Court at this time?

MR. DONNELLY: Your Honor, it's my understanding based on the notice of hearing that we received from the Court that in the original case that was entitled Minder v. Haggerty, which of course now is part of this one consolidated case, it is that motion to dismiss as well as a motion for sanctions filed by defendants Haggerty, Waite and Nowicki.

THE COURT: So it's a motion to dismiss by Haggerty, Waite and Nowicki on what grounds?

MR. DONNELLY: Failure to state a claim. Now, that's my understanding of what the Court has noticed for hearing.

THE COURT: Okay.

MR. DONNELLY: I've also filed another motion in the case that was originally Hill v. Haggerty.

THE COURT: Yeah.

MR. DONNELLY: And that was also a Rule 12 motion, failure to state a claim, qualified immunity, and res judicata. That's on the state law claim.

THE COURT: Oh, Hill is the personal representative, right?

MR. DONNELLY: Correct, but that lawsuit that I'm referring to was not brought as personal representative. It was brought individually.

THE COURT: I know, okay. So you're saying a motion to dismiss by Haggerty, Watie and Nowicki as defendants -- and who is the plaintiff in the lawsuit?

MR. DONNELLY: Suezette Minder.

THE COURT: The half-sister?

MR. DONNELLY: That's correct. That is the one that I understand was noticed by the Court for hearing today.

THE COURT: Okay. And what other motion is pending?

MR. DALTON: Your Honor --

THE COURT: Do you have another motion pending?

MR. DONNELLY: That's correct, Your Honor. I have another motion in the same --

THE COURT: Just give it to me substantively.

MR. DONNELLY: Another 12(b) motion, failure to state a claim.

THE COURT: By whom?

MR. DONNELLY: By the same defendants, Haggerty, Nowicki and Waite. Failure to state a claim, qualified immunity, and res judicata as to the claims make by Plaintiff Hill individually.

THE COURT: Hill individually. And that's failure to state a claim. What else?

MR. DONNELLY: Res judicata and qualified immunity.

THE COURT: Now, is the claim from your perspective against Haggerty, Waite and Nowicki, failure to state a claim by Minder, what are her -- what are the counts of her complaint that you're saying don't state a claim?

MR. DONNELLY: Well, I don't believe -- I'm not sure if the complaint is split into counts, Your Honor.

THE COURT: Well, as you understand it, what are the claims?

MR. DONNELLY: Well, the claim is that the defendants acted in an extreme and outrageous manner.

THE COURT: No, you've got --

MR. DONNELLY: I'm not sure. He said the 4th and 14th amendments. Those are the two constitutional provisions that

are referred to in the complaint.

THE COURT: The 4th and 14th amendments. And the second motion, Hill, what are the claims there?

MR. DONNELLY: The same. The complaints are almost identical.

THE COURT: Well, how can you plead qualified immunity if you don't know what he's charging you with?

MR. DONNELLY: Well, it's something we wanted to raise in our first response.

THE COURT: Where is res judicata? The only thing the state court dealt with was intentional infliction of emotional distress.

MR. DONNELLY: In looking at the compliant and trying to read it and understand, in the event that he was making state law claims, the res judicata would apply to any state law claims.

THE COURT: Now, are there any other motions pending?

MR. DONNELLY: Just motions for sanctions.

THE COURT: Forget those.

MR. DALTON: Yes, the Clay Township defendants in the original case of Hill as personal representative where the only defendants are Clay Township, Canode, and Montville, we filed a motion for summary judgment.

THE COURT: Clay, Canode, Montville and Rummel --

MR. DALTON: No, Rummel is not a defendant on this one. It's just Clay, Canode and Montville.

THE COURT: Okay. Summary judgment?

MR. DALTON: Yes.

THE COURT: And who is the plaintiff?

MR. DALTON: Winter Hill as the personal representative.

THE COURT: What? Hill as personal representative?

MR. DALTON: Yes.

THE COURT: But that's not up yet?

MR. DALTON: Right. I spoke with your clerk this morning, and I was advised that it will be reset for another date.

THE COURT: Okay. Those are the only motions pending?

MR. DALTON: As of this moment, yes.

THE COURT: Okay. Mr. Lord, I'm not going to hear arguments today. I'm going to be very candid with you. Unless you get some help in this case from a younger and more-experienced lawyer familiar with police litigation, this case is going to go down the tube, and I don't know whether Mr. Hill as personal representative of the estate or his father or the half-sister have a cause of action for what you claim is an excessive use of force, but the only claim that I can see that is in this case is an excessive use of force claim.

I don't think there's -- this was a police shooting, and I hate to use this term, but there is nothing exceptional, as I understand the claims, Mr. Donnelly, and you are experienced in these matters, in police shootings, aren't you?

MR. DONNELLY: Yes, Your Honor.

THE COURT: Is it fair to say that there's nothing exceptional in terms of a case as a police shooting in this case over any other police shooting?

MR. DONNELLY: Not that I see, Your Honor, no.

THE COURT: There's a, there's a confrontation between a police officer and a suspect or a wrongdoer and the police officer uses deadly force?

MR. DONNELLY: That's correct.

THE COURT: What?

MR. DONNELLY: That's correct.

THE COURT: Now, sometimes when a police officer uses deadly force it's justified. Other times it is not justified. Is that right?

MR. DONNELLY: That's correct.

THE COURT: And that's a 14th amendment claim?

MR. DONNELLY: It might be a 4th amendment claim, Your Honor.

THE COURT: Well, it's only a 4th amendment claim because the 14th amendment has incorporated the 4th amendment; is that fair?

MR. DONNELLY: That's fair.

THE COURT: Okay. And conventionally it's only the police officer on the scene or someone else on the scene with him that in effect condones the use of deadly force or doesn't intervene that is chargeable?

MR. DONNELLY: As potential defendants in a civil action, correct.

THE COURT: As potential defendants in a civil action. And conventionally these cases do not implicate a state law claim of intentional infliction of emotional distress.

MR. DONNELLY: No, Your Honor.

THE COURT: Is that a fair statement?

MR. DONNELLY: I believe that is a fair statement.

THE COURT: And there's nothing in this one that goes beyond that?

MR. DONNELLY: Not that I am aware of.

THE COURT: And conventionally a friend would have no standing at all, right?

MR. DONNELLY: That is true.

THE COURT: The personal representative would have standing?

MR. DONNELLY: True

THE COURT: Standing in the shoes of the deceased, and a father or a half-sister might have standing for loss of consortium?

MR. DONNELLY: In the, in the claim brought by the personal representative.

THE COURT: In the claim brought by the personal representative, but no direct claim?

MR. DONNELLY: Correct.

MR. LORD: Well, Your Honor --

THE COURT: Under the law.

MR. DONNELLY: That is my understanding.

THE COURT: Of the law.

MR. DONNELLY: Correct.

MR. LORD: For loss of society and companionship.

THE COURT: That's consortium. Loss of society. Consortium is the spouse. Society. I used the wrong term. Society and companionship, right?

MR. DONNELLY: I understood you.

THE COURT: I know you did.

All right. I'm going to take this under advisement, and I'm going to give you 30 days, Mr. Lord, to do two things; file a single, consolidated amended complaint alleging with particularity the wrongful act and how each of the individual defendants is liable for the wrongful act or acts and how each plaintiff who you want to keep in separate claims, and I'm going to advise you that you better get a lot of help because you have managed out of one unfortunate incident to file five lawsuits, four in federal court and one instate court. You've already lost the state court one, and the family here may have a good claim. I don't know. But it's pretty mucked up right now.

Now, that's your choice. Whether you get new counsel or not, I don't care, but I'm going to give you 30 days to file a consolidated amended complaint, and I'm not going to ask for any further response from the defendants at this time.

MR. LORD: Your Honor, one consolidated for all of these consolidated cases?

THE COURT: These cases have all been consolidated, it's called a consolidated amended complaint, in substitution for the four cases that are before the Court. You'd better be careful how you draft it.

And ordinarily -- I know you both are going to want sanctions, but let's forget sanctions. Mr. Lord is over his head, and if he doesn't recognize it, I will.

Do you have anything further, either of the defendants?
MR. DONNELLY: No, Your Honor.
MR. DALTON: Nothing else, Your Honor.
THE COURT: Mr. Lord, do you want to say anything?
MR. LORD: Nothing, Your Honor.
THE COURT: Thank you. Thank you, gentlemen.
MR. LORD: Thank you.
(Proceedings concluded at 2:29 p.m.)

CERTIFICATION

I, Sheri K. Ward, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

(s) Sheri K. Ward, RPR — Date 10-1-98
Official Court Reporter

Appendix F

APPENDIX F

Civil Action No. 97-76159

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

WINTER RANDOLPH JOSEPH HILL,

Plaintiff,

v.

TOWNSHIP OF CLAY, et al.,

Defendants

DEFENDANT'S PARTIAL MOTION TO DISMISS
DEFENDANT'S MOTION TO COMPEL
PLAINTIFF'S MOTION TO REMAND

Wednesday, April 1, 1998

BEFORE THE HONORABLE AVERN COHN
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 219
Detroit, Michigan

Appearances:

Robert J. Lord, Esq.,
On behalf of the Plaintiff,
Daniel P. Dalton, Esq.,
On behalf of the Defendants,
Sheri K. Ward, RPR,
Court Reporter.

Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

Appendix F

Detroit, Michigan
Wednesday, April 1, 1998
2:22 p.m.

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P-R-O-C-E-E-D-I-N-G-S

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THE CLERK: Case Number 97-76159, Hill v. Township of Clay.

MR. DALTON: Good afternoon, Your Honor, Daniel Dalton on behalf of the defendants.

THE COURT: Go ahead, sir.

MR. DALTON: Your Honor, there are three motions up this afternoon. The first one is Defendant's Partial Motion to Dismiss under 12(b) (6). This goes to Counts 3 and 4 of plaintiff's complaint. In both Counts 3 and 4 the step-sister or half-blood sister and the father claim damages for emotional distress and loss of consortium. In terms of the emotional distress argument, that claim is barred by cases --

THE COURT: Well, I would agree with you that you can't have a claim for emotional distress because you saw a dead body several hours after the event in question. There was no obligation to look at the body if you had to go to a funeral or because you went back to the scene of the crime and saw blood on the floor. That's not the basis of a claim for emotional distress..

However, the claim for loss of consortium is in a different order, and my understanding of the law in Michigan is that you can claim loss of consortium if you have the relationships that these two plaintiffs had to this decedent.

MR. DALTON: Well, under Sizemore v. Smock, I think that case is very clear in terms of Michigan law that only a parent -- I'm sorry, a husband and wife can have claims for a loss of consortium. A parent cannot have consortium for a child.

That's what Sizemore said. Brothers and sisters cannot have loss of consortium for each other.

That is the state law claim. The federal law under the 1983 Act said there is no claim for loss of consortium.

THE COURT: Well, I agree under 1983 there is none, but I think though that Sizemore was a child that was not killed, was only injured.

MR. DALTON: That's true.

THE COURT: Well, this is death. This isn't injury. So where do you have a case on --

Do you want to say something? I thought I was doing pretty well for you.

MR. LORD: Well --

THE COURT: Not as well as I did the last time, but I did win in the Court of Appeals. Mr. Lord and I 25 years ago tangled, and that's the only proper word to use, but I hold no bias or animus because I ultimately prevailed, although I had to go to the Court of Appeals to do it. Anyhow -- that's the Michigan Court of Appeals.

Anyhow, my understanding, sir, is that Michigan does recognize loss of consortium for death in these relationships.

MR. LORD: Except, if I may interject, and acknowledging that you're doing pretty well for me, except there is no loss of consortium provided in the state statute MCLA 600.22926. It is for loss of society and companionship.

THE COURT: That's right. Okay. It's loss of society and companionship, which is a variation of consortium. It's the analogous relationship between a parent or a sibling.

Okay. What else do you have to say?

MR. DALTON: I guess just in regard to that, Your Honor, that goes in terms of distribution of damages from the proceeds of a wrongful death claim. That' s the statute Mr. Lord is referencing.

In terms of the absolute immunity of plaintiff's state tort

claims against Chief Canode, I don't believe there was a response. 691.4075 provides for absolute immunity. In the case of Washington v. Stark absolute immunity --

THE COURT: Well, look, this was an action between a police officer and a person. The police officers may be liable, may not. I don't see any basis for claiming either the municipality or the chief, that would be a respondeat superior, and in the circumstances here he's not going to be able to establish lack of adequate training or failure to have a policy on deadly force or something.

MR. DALTON: That's true.

MR. LORD: Your Honor said that can't be proven?

THE COURT: I seriously doubt it. I seriously --

MR. LORD: Well, let me say I seriously contend that it can and will. All it takes is depositions. That's all.

THE COURT: Well, I'll tell you what. I'll delay the ruling and give you 60 days to take depositions.

MR. LORD: To take what?

THE COURT: 60 days to take depositions. Set this hearing for 75 days over, and see what you come up with.

MR. LORD: Thank you, Your Honor.

MR. DALTON: The next motion is our Motion to Compel Interrogatories under Rule 37(a).

THE COURT: Well, traditionally I don't deal with discovery motions. I assume he will answer your interrogatories.

MR. LORD: I did already.

THE COURT: If he didn't, you call us and we'll deal with it.

THE WITNESS: Okay. Thank you.

The last one is Plaintiff's Motion to Remand.

THE COURT: You can't remand it. You're in this court properly under 1983.

MR. DALTON: Thank you, Your Honor.

MR. LORD: Thank you, Your Honor.

THE COURT: We'll draw an appropriate order.

MR. DALTON: Thank you.

MR. LORD: Thank you, Your Honor, and that was again, just so when I leave here, how many days discovery?

THE COURT: You've got 60 days on the depositions, and we're going to set a new hearing date 75 days from today.

MR. LORD: Thank you, Your Honor.

(Proceedings adjourned at 2:28 p.m.)

Appendix F

C-E-R-T-I-F-I-C-A-T-I-O-N

I, Sheri K. Ward, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

(s) Sheri K. Ward, RPR Dated 4-15-98
Official Court Reporter